Supreme Court, U.S.
FILED
AUG 13 2001
CLERK

No. 01-90

In The

Supreme Court of the United States

REV. NOAH BROUGHTON, REV. EARL OWENS, REV. RON LITTLE, REV. BILLY MILLER, REV. JAMES LOCKARD, REV. ROBERT FLYNN, REV. JAMES MILLS, REV. STUART MASON, REV. CHARLES BULLOCK, REV. DAVID CARR, REV. KENNETH NICHOLAS, REV. CHARLES PRATER, REV. CLINT KEITH, and PRINCIPAL DAN COGGINS,

Petitioners,

vs.

PULASKI FISCAL COURT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HON. WILLIAM M. THOMPSON
Pulaski County Attorney
Counsel of Record
P.O. Box 5
Somerset, KY 42502
Attorney for Respondent
606-679-4440

HON. F.G. NEIKIRK
Of Counsel
P.O. Box 5
Somerset, KY 42502
Attorney for Respondent
606-679-4440

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OR CALL COLLECT (402) 342-2831

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STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari does not meet the standards as set forth in Supreme Court Rule 10, therefore the Court should deny jurisdiction in this matter.

COUNTERSTATEMENT OF THE CASE

Pulaski Fiscal Court Ordinance 202.22

The Ordinance at issue does not require a pastor or affiliated ministers to obtain a business license before engaging in or performing their ministerial duties nor does it interfere with the exercise of any aspect of their religious practice. The question presented is NOT whether a minister or religious teacher is taxed on his religious freedoms, as the Petitioner claims. The issue is whether income derived by ministers or religious teachers through salaries are subject to taxation under Pulaski County's Ordinance.

ARGUMENT

THIS COURT SHOULD DENY PETITIONER'S WRIT OF CERTIORARI BECAUSE THERE IS NO COMPELLING REASON TO GRANT THE SAME.

There are no compelling reasons for granting Certiorari because the entire case rests on existing Federal Law extensively relied on by our state courts in the case at bar.

The Ordinance is in no way a violation of any person's constitutional rights to the free exercise of religion in that the ordinance has no affect whatsoever on the uncompensated exercise of same which any person is free to do without being subject to the fee tax in question. The Kentucky Court of Appeals opined that " . . . the Pulaski County license fee tax in no way . . . impedes, interferes with, dictates, or infringes upon how they exercise any aspect of their religion. They are free to practice their religion totally unencumbered by any regulation by Pulaski County." (See Kentucky Court of Appeals Opinion, page 6 in Appendix B). The ordinance applies only when compensation is involved and there is no constitutional preference which allows for one compensated group to avoid a fee tax which another compensated group must pay.

Respondent cannot improve upon the opinions of the Pulaski Circuit Court or Commonwealth of Kentucky, Court of Appeals and incorporates same herein as its response. (See Appendix A and B).

CONCLUSION

As has been established, there are no compelling reasons for this Court to grant the Petition for Writ of Certiorari.

The highest court of the Commonwealth, the Kentucky Supreme Court chose not to grant review and the Supreme Court of the United States should not grant certiorari.

Respectfully submitted,

HON. WILLIAM M. THOMPSON
Pulaski County Attorney
Counsel of Record
P.O. Box 5
Somerset, KY 42502
Attorney for Respondent
606-679-4440

HON. F.G. NEIKIRK
Of Counsel
P.O. Box 5
Somerset, KY 42502
Attorney for Respondent
606-679-4440

APPENDIX A

COMMONWEALTH OF KENTUCKY
28TH JUDICIAL CIRCUIT
PULASKI CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 99-CI-00345

NOAH BROUGHTON, ET AL, PLAINTIFF,

VS: **DECLATORY JUDGMENT**

PULASKI FISCAL COURT, DEFENDANT.

* * *

The Defendant, Pulaski Fiscal Court, having moved the Court for a Judgment on the pleadings, and after hearing said Motion, and arguments of counsel, and review of submitted Briefs, and being otherwise sufficiently advised, the Court finds that this matter is appropriate for a Judgment on the pleadings and hereby enters the following Findings of Fact, Conclusions of Law, and Declaration of Judgment:

FINDINGS OF FACT

1. The Plaintiffs are persons who receive net profits, salaries, wages, commissions, or fees, as a result of the practice of their religious activities in Pulaski County, Kentucky.

2. Pulaski County Fiscal Court assesses through its Department of License Fee Collections pursuant to County Ordinance 220.9, enacted in 1988, and amended thereafter, a license fee on businesses, trades, occupations, and professions, transacting within its county

limits. This tax is commonly referred to as an occupational tax as it is assessed in the form of a percentage of wages or net profits earned by persons with businesses, trades, occupations, and professions. The purpose of this tax is to raise revenue. The state statute which permits this county ordinance is KRS 68.197.

3. Neither the Pulaski County Ordinance or KRS 68.197 allows an exemption from the license fee tax for persons who receive net profits, salaries, wages, commissions, or fees as a result of the practice of their religious activities.

CONCLUSIONS OF LAW

This Court has both subject matter jurisdiction and jurisdiction over the parties in this action, Pulaski County is the appropriate venue for this action.

JUDGMENT

This Court has previously examined Pulaski County's occupational tax ordinance in *Duncan v. Pulaski Fiscal Court*, 94-CI-00681. Therein, we declared, based on *City of Louisville, et al, v. Sebree*, 214 S.W.2d 248 (Ky. 1948) and the line of cases thereafter, that the enactment and revenue raising purpose of Pulaski County Ordinance 220.9 was constitutional.

The issue now before the Court is a matter of application of said Ordinance. The Plaintiffs argue that to impose this tax on persons who receive net profits, salaries, wages, commissions, or fees as a result of the practice of their religious activities is an unreasonable impediment

to their constitutional right to the free exercise and expression of religion.

They argue that being a Minister is not a "privilege" which would be subject to license fee taxation, but is instead a "right" which is not subject to license fee taxation. They acknowledge that income of Ministers is subject to income taxation but they also correctly point out that under Kentucky's constitution, Counties do not have the power to tax income. The Plaintiffs thus present a classic "catch 22" situation.

While the argument of the Plaintiffs is understood and appreciated, this Court fashions here a ruling in the spirit of and consistent with Chief Justice Palmore's concurring opinion in *Hopson v. Commissioners of the Sinking Fund of the City of Louisville*, 614 S.W.2d 620, (Ky. 1981). That case involved essentially the same issue before this Court, only it involved whether or not Constitutional Officers could be made subject to license fee taxation. The argument presented on behalf of the Constitutional Officers was identical to the argument presented here by the Plaintiffs.

In the *Hopson* case at Page 621, Chief Justice Palmore wrote:

> About as close as we can come to the truth of the matter is that the occupational tax is a tax on income, and probably would be illegal except for the fact that this Court in *Sebree* saw fit to legalize it by the stratagem of calling it something else . . .
>
> It is enough that whatever it may be called, it was declared valid in 1948, and as the opinion of the Court Appeals observed, it does not any

> more impinge upon the right or privilege of constitutional officers to carry out their functions than it does upon the privilege of anyone else to earn a living. We think it would be grossly unfair to the public in general for us to seize upon technical grounds and declare that we or any other public officers are exempt from it.

The imposition of the Pulaski license fee tax is no more than one of the methods which Pulaski County uses to raise revenue. In no manner, is any activity of any of the "persons" which are subject to this tax regulated by Pulaski County. Specifically as to these Plaintiffs, the Pulaski County license fee tax in no way, impedes, interferes with, dictates, or infringes upon how they exercise any aspect of their religion. They are free to practice their religion totally unencumbered from any regulation by Pulaski County.

The Pulaski County ordinance merely imposes a license fee tax calculated on net profits, salaries, wages, commissions, or fees, earned by persons with businesses, trades, occupations, and professions. By definition and as pled herein, the Plaintiffs fall therein. They derive taxable income from their profession within Pulaski County. It is because of and upon that taxable income that the Pulaski County license fee tax is applied and calculated.

The Constitution guarantees only free expression of the rights raised by the Plaintiffs and even that is, without question, subject to reasonable restriction by the state. Here, there is no impediment whatsoever to the free expression of religion. This license fee tax applies only

when "compensation" is earned as a result of a "profession". It is certainly reasonable that the Plaintiffs contribute, just as does every other person with a business, trade, occupation, or profession with subject income, to help pay for the services and protections afforded by Pulaski County.

Again quoting from Chief Justice Palmore in *Hopson* at Page 620:

> From the beginning to end this controversy has been a battle of labels. What is the occupational tax? Is it an income tax or a license tax? If it is a local income tax, orthodoxy suggests that it is not permitted by Sec. 181 of the Constitution. If it is truly a license tax, in the classical sense, it cannot be applied to constitutional officers. If the tax is on the money it is really an income tax. If it is on the privilege of engaging in an occupation it is really a license tax. And so on. This type of reasoning can be carried on to the point of absurdity in just about any direction.

Our goal here is to advance the law's true purpose within the bounds of precedent and reason. The purpose of Pulaski County's occupational tax is to raise revenue to pay for necessary services which benefit a citizenry inclusive of the Plaintiffs. The function of the occupational tax is totally non-regulatory. The effect of the occupational tax is no more "chilling" upon the Plaintiffs than is a permissible state income tax.

It is this Court's opinion that the Plaintiffs are in the same position as the Constitutional Officers were in the *Hopson* case. Therefore, it is this Court's duty to rule in a manner consistent therewith.

THEREFORE, IT IS HEREBY DECLARED;

1. That Pulaski County Order 220.9 is constitutional in its application to the Plaintiffs, and they are otherwise subject to the taxation imposed by same.

2. That this Judgment is final and appealable and this matter is hereby stricken from the docket of this Court.

Given under my hand as Judge of the Pulaski Circuit Court, Division II, this [illegible] day of July, 1999.

/s/ William T. Cain
WILLIAM T. CAIN, JUDGE
PULASKI CIRCUIT COURT

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Seminole, Florida 33772

This 7th day of July, 1999.

/s/ George Flynn/bjg
CLERK, PULASKI CIRCUIT COURT

APPENDIX B

RENDERED SEPTEMBER 29, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002136-MR

REV. NOAH BROUGHTON; REV. EARL OWENS;
REV. RON LITTLE; REV. BILLY MILLER;
REV. JAMES LOCKARD; REV. ROBERT FLYNN;
REV. JAMES MILLS; REV. STUART MASON;
REV. CHARLES BULLOCK; REV. DAVID CARR;
REV. KENNETH NICHOLS; REV. CHARLES PRATER;
REV. CLINT KEITH; DAN COGGINS APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 99-CI-00345

PULASKI FISCAL COURT APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: HUDDLESTON, MILLER AND TACKETT, JUDGES.

TACKETT, JUDGE: Appellants, Dan Coggins, as well as Revs. Noah Broughton, Earl Owens, Ron Little, Billy Miller, James Lockard, Robert Flynn, James Mills, Stuart Mason, Charles Bullock, David Carr, Kenneth Nichols, Charles Prater, and Clint Keith, appeal from a declaratory judgment issued by the Pulaski Circuit Court. We affirm.

Appellants are persons who receive remuneration from the practice of their religious activities in Pulaski County. All appellants except Coggins are employed as pastors, evangelists, or youth ministers in Pulaski County. Coggins is principal of a religious school in Pulaski County. Appellants filed a declaratory judgment action in the Pulaski Circuit Court against appellee, Pulaski Fiscal Court (Fiscal Court), seeking to have that court find certain Pulaski County Fiscal Court ordinances declared unconstitutional. The ordinances in question, enacted under the auspices of Kentucky Revised Statute (KRS) 68.197, assess a license fee, commonly called an occupational tax, on businesses, trades, occupations, and professions transacting business in Pulaski County. The license fee is assessed as a percentage of wages or net profits earned.[1]

Appellants contended that the license fee violated the free exercise of religion clause of the United States and Kentucky Constitutions. (Specifically, §§ 1, 5 and 8, of the United States and § 181 of the Kentucky Constitution.)[2]

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[1] The record does not contain copies of the ordinances in question. However, all parties agree as to their relevant contents.

[2] Section one of the Kentucky Constitution protects, *inter alia*, the right of people to worship "Almighty God according to the dictates of their consciences." Section five also protects religious freedom. Section eight protects freedom of speech and of the press. Section 181 of the Kentucky Constitution permits the General Assembly to "delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees . . . on franchises, trades, occupations and professions." However, local governments are not permitted to levy local income taxes. *See e.g., Hopson v. Commissioners of*

Appellants and the Fiscal Court filed motions for judgment on the pleadings. Kentucky Rule of Civil Procedure (CR 12.03. The trial court issued a declaratory judgment finding the ordinances to be constitutional and applicable to the appellants. After the trial court denied a motion to alter, amend, or vacate, this appeal was filed.

Appellants argue on appeal that the ordinances in question violate the constitutional provisions previously set forth herein. "The question thus presented is one of law" as a party moving for judgment on the pleadings "admits for the purposes of his motion not only the truth of all of his adversary's well-pleaded allegations and fair inferences therefrom, but also the untruth of all of his own allegations which have been denied by his adversary." *Archer v. Citizens Fidelity Bank & Trust Company*, Ky., 365 S.W.2d 727, 729 (1962). The trial court's decisions on questions of law are entitled to no deference. *See e.g., Scifres v. Kraft*, Ky. App., 916 S.W.2d 779, 781 (1996). An ordinance is presumed valid if "any proper reasonable basis" can be identified to support it. *City of Erlanger v. KSL Realty Corporation*, Ky., 704 S.W.2d 649, 650 (1986). However, "the established policy in the interpretation of taxing statutes [or ordinances] is to resolve doubts in favor of the taxpayer." *George Wiedemann Brewing Company v. City of Newport*, Ky., 321 S.W.2d 404, 407 (1959).

Sinking Fund of City of Louisville, Ky., 613 S.W.2d 619, 620 (1981) (Palmore, J., concurring), *cert. denied* 454 U.S. 826, 102 S.Ct. 117, 70 L.Ed.2d 101 (1981). The First Amendment to the United States Constitution protects freedom of religion and freedom of speech.

Among the appellants' arguments is that the license fee is an impermissible income tax, contrary to § 181 of the Kentucky Constitution. This argument is without merit as the appellate courts of this state have consistently viewed similar revenue producing measures to be permissible occupational taxes, not impermissible income taxes. *See e.g., City of Louisville v. Sebree,* 308 Ky. 420, 214 S.W.2d 248 (1948); *Commissioners of the Sinking Fund of the City of Louisville v. Hopson,* Ky. App., 613 S.W.2d 621 (1980); *Patrick v. City of Frankfort,* Ky., 539 S.W.2d 275 (1976).[3]

This appeal turns on whether Pulaski County's occupational tax may be levied upon the appellants. Relying primarily upon *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) and *Follett v. Town of McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed.2d 938

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[3] Although the courts of this state have steadfastly refused to change their ultimate opinion that these types of revenue producing measures are not income taxes, they have questioned the legal basis for that conclusion. *See e.g., Commissioners of the Sinking Fund of the City of Louisville v. South Central Bell Telephone Company,* Ky., 809 S.W.2d 380, 381-82 (1991) ("We in Kentucky have deluded ourselves into believing that an occupational tax is not an income tax through the medium of *City of Louisville v. Sebree . . .* "); *Hopson, supra* at 621 ("the occupational tax is a tax on income, and probably would be illegal except for the fact that this court in *City of Louisville v. Sebree . . .* saw fit to legalize it by the stratagem of calling it something else"). Even if we were inclined to overrule *Sebree, arguendo,* we could not do so under Supreme Court Rule (SCR) 1.030(8)(a), which states that "[t]he Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court."

(1944), appellants argue that Pulaski County's occupational tax improperly violates their constitutional right to freely exercise their religion. Those cases are distinguishable, however, because they did not involve an occupational tax levied as a percentage of a person's income. Rather, those cases involved a flat fee to be paid before someone could engage in their religious activities. This distinction was made evident in *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 389, 110 S.Ct. 688, 695, 107 L.Ed.2d 796 (1990), in which the Court limited "*Murdock* and *Follett* to apply only where a flat license tax operates as a prior restraint on the free exercise or religious beliefs".

Pulaski County's occupational tax does not regulate per se any religious activity. As noted by the trial court, "the Pulaski County license fee in no way . . . impedes, interferes with, dictates, or infringes upon how they [appellants] exercise any aspect of their religion. They are free to practice their religion totally unencumbered by any regulation by Pulaski County." To put it plainly, Pulaski county's occupational tax is a straight forward, neutral revenue-producing measure intended to help pay for the services offered to the general public by that county.

We do not doubt in any way the sincerity of appellants' religious beliefs. However, it is undisputed that appellants derive income from their employment in Pulaski County. Therefore, they stand in the same position as all others similarly situated who have raised

similar claims[4] as freedom of religion does not mean that one is free "from all financial burdens of government, including taxes on income or property." *Follett, supra* at 321 U.S. 578, 64 S.Ct. 719. *Accord Murdock, supra* at 319 U.S. 112, 63 S.Ct. 874.

The judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

A.C. Donahue
Somerset, Kentucky

David C. Gibbs, III
Seminole, Florida

BRIEF FOR APPELLEE:

Michael Louis Duncan
Somerset, Kentucky

---

[4] Judicial officers are not exempt from similar taxes, *Hopson, supra* at 624, nor are federal employees, *Patrick, surpa.*